IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
TYSON FOODS, INC., *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANT COBB-VANTRESS, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT WITH REGARD TO PLAINTIFFS' STATE LAW AND FEDERAL COMMON LAW CLAIMS (Dkt. No. 2062)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES & REGULATIONS

SECONDARY SOURCES

INTRODUCTION

Defendant Cobb-Vantress, Inc. ("Cobb-Vantress") respectfully submits this brief in opposition to Plaintiffs' Motion for Partial Summary Judgment ("Motion" or "Mot."), addressing specifically Plaintiffs' arguments for summary judgment under their common law and/or state law claims.[1] First and foremost, Plaintiffs ask the Court to rule in their favor and impose, on summary judgment, a theory of vicarious liability never accepted by any Oklahoma or Arkansas State Court. The law in both States is that the protections afforded a principal from liability for the conduct of an independent contractor are waived only where the contractor is retained to engage in an inherently dangerous activity. Plaintiffs can make no such showing in this case. Second, Plaintiffs ask the Court to resolve in their favor on summary judgment myriad key disputed facts and to award them injunctive relief. As this would plainly be improper, this motion should be denied.

LEGAL STANDARD

The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Adler v. Wal-Mart Stores*, 144 F.3d 664, 670 (10th Cir. 1998). "[An] issue of fact is 'genuine' if the evidence allows a reasonable jury to resolve the issue either way and is 'material' when it is essential to the proper disposition of the claim." *Haynes v. Level 3 Comm.*, 456 F.3d 1215, 1219 (10th Cir. 2006). All factual inferences are drawn in favor of the non-moving party, *see Adler*, 144 F.3d at

[1] The Court authorized Plaintiffs to file a "reasonably sized summary judgment motion." *See* Minute Order, Dkt. No. 1846 (Feb. 4, 2009). Plaintiffs took that Order to authorize a 64-page summary judgment brief. The Court's Order did not address Defendants' page allowance for a brief in opposition. In order to respond to Plaintiffs' submission in a manner compliant with the local rules, Defendants have divided their response between a fact brief and two legal briefs, which combine to fewer substantive pages than used in Plaintiffs' Motion, and in which all Defendants will join. If the Court prefers, Defendants can refile a single, unified brief.

670, and the party with the burden of proof "must set forth specific facts showing a genuine issue for trial as to those dispositive matters." *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1169 (10th Cir. 2004). Where the moving party bears the burden of persuasion at trial, it must come forth with sufficient evidence to support the essential elements of its claims, not simply identify the absence of facts supporting defenses. *See Adler*, 144 F.3d at 670.

STATEMENT OF DISPUTED FACTS

This motion incorporates and relies upon the Statement of Disputed Facts set out in full in *Defendant Tyson Foods, Inc.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment—Statement of Undisputed Facts*, Dkt. No. 2183 (June 5, 2009) ("Disputed Facts").

I. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON ANY PORTION OF THEIR STATE OR FEDERAL COMMON LAW, STATUTORY OR REGULATORY CLAIMS

A. Defendants Are Not Vicariously Liable for the Conduct of Non-party Contract Growers Pursuant to the Legal Theory Advanced Under Restatement (Second) of Torts § 427B

As Plaintiffs acknowledge, it is well settled in Oklahoma and Arkansas that principals are generally not liable for harm caused by independent contractors. *See, e.g., Tankersley v. Webster*, 243 P. 745 (Okla. 1925); *Stoltze v. Ark. Valley Elec. Co-op Corp.*, 127 S.W.3d 466 (Ark. 2003).[2] Plaintiffs attempt to avoid this rule by invoking Section 427B of the Restatement (Second) of Torts, and arguing that Defendants should nevertheless be liable on the basis that

[2] As explained in several of Defendants' motions for summary judgment, the Supreme Court has made clear that this Court must apply Arkansas law to claims arising from alleged nuisance causing conduct that occurred in Arkansas and Oklahoma to claims arising from alleged nuisance causing conduct that occurred in Oklahoma. *See, e.g.*, Defendants' Joint Motion for Summary Judgment on Counts 4 & 5, Dkt. No. 2033 at 1 n.1 (May 11, 2009). Plaintiffs thus ask this Court to displace the law of two different States.

Defendants contracted with non-party Growers[3] to engage in conduct that would "likely" result in a nuisance or tort. Section 427B provides that

> [o]ne who employs an independent contractor to do work which the employer knows or has reason to know to be *likely* to involve a trespass upon the land of another or the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance.

Restatement (Second) of Torts § 427B (emphasis added). But no State, let alone Oklahoma or Arkansas, has ever expressly adopted Section 427B, and for this Court to do so would be inconsistent with the law of both States. Moreover, Plaintiffs' claim for summary judgment relies on numerous disputed facts. The record before the Court does not support an award of summary judgment on this ground.

1. Section 427B has no application in Oklahoma or Arkansas law

As a threshold matter, neither the Oklahoma Supreme Court, the Oklahoma Court of Civil Appeals, the Arkansas Supreme Court, nor the Arkansas Court of Appeals has adopted Section 427B of the Restatement (Second) of Torts as controlling legal authority for any purpose, much less the circumstances similar to those in this lawsuit. In fact, no state court has ever expressly adopted Section 427B.[4] Plaintiffs thus ask this Court to issue a ruling, on

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[3] Plaintiffs' motion addresses only Defendants' responsibility for the conduct of the non-party Contract Growers. It says nothing regarding the conduct of the many farmers and ranchers who have no contractual relationship with Defendants and who apply poultry litter obtained from a third party. Approximately half of all poultry litter used in the IRW is land-applied by these non-party farmers and ranchers. *See* Dkt. No. 2033 at 6 ¶19; *see also* Disputed Facts ¶¶10, 28 (citing Dkt. No. 2183 Ex. 2 at 57-58 ("A review of the 2008 PFO Registry data from operators located in the IRW … Benton and Washington counties shows that … 65% of all the poultry manure [was] either transferred or sold, although the data does not allow us to assess whether these transfers occur within or outside of the IRW.")).

[4] Michigan, it appears, has come the closest of any state to expressly adopting Section 427B. In *Schoenherr v. Stuart Frankel Dev. Co.*, 260 Mich. App. 172 (2003), the Michigan Court of Appeals discussed Section 427B, but it found the section inapplicable because the plaintiffs had not demonstrated the section's requisite notice. *See id.* at 180. Thus, in *Lasky v. Realty Dev. Co.*, 2006 Mich. App. LEXIS 1487 (2006), the same court explained that *Schoenherr* "could be

summary judgment, substantively expanding the tort law of both Arkansas and Oklahoma. The Court should decline to do so.

Plaintiffs' only Oklahoma state law authority on the issue of assigning an independent contractor's tort liability to an employer is their citation to *Tankersley v. Webster*, 243 P. 745 (Okla. 1925). But that case strongly suggests that Section 427B is not compatible with Oklahoma law. The plaintiff in *Tankersley* was injured after picking up and playing with a blasting cap left at a construction site. The plaintiff sued the general contractor, who defended arguing that responsibility lay with the independent subcontractor who had used the blasting caps in excavating the foundations for the new school building. *See id.* at 746-47. The Court recognized and applied the general rule that a principal is not responsible for the conduct of the independent contractor. *See id.* at 747-47, However, the court noted a possible exception where "the performance of a specific job by an independent contractor in the ordinary mode of doing the work necessarily or naturally results in causing an injury." *Id.* at 747. Thus, it observed, had the plaintiff demonstrated that the excavation necessarily required the blasting, and had such required blasting caused the injury, then the outcome might have been different. *See id.* at 747-48. The rule the *Tankersley* court invoked is not the rule subsequently codified in Restatement § 427B, but rather is the "inherently dangerous activity" rule reflected in

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read to *implicitly* extend a cause of action [under Section 427B]," but yet again refrained from applying that section in the case. *Id.* at *16 (emphasis added). Similarly, some federal district courts have *predicted* that Pennsylvania would adopt the section, though no Pennsylvania court has since done so. *See, e.g., Rohrbach v. AT&T Nassau Metals Corp.*, 1994 U.S. Dist. LEXIS 14468 (M.D. Pa. 1994); *McQuilken v. A&R Dev. Corp.*, 576 F. Supp. 1023, 1032–33 (E.D. Pa. 1983). A few states have acknowledged—and not rejected—arguments raised under 427B, thus suggesting that they might be open to considering its application. But these courts did not actually rule on Section 427B's merits, much less adopt it as governing law. *See, e.g., Smith v. Lucky Stores*, 132 Cal. Rptr. 628, 630 & n.3 (Cal. Ct. App. 1976); *Gordon v. AMTRAK*, 1997 Del. Ch. LEXIS 52, at *59–60 (Del. Ch. 1997); *Santella v. Whynott*, 538 N.E.2d 1009, 1011 (Mass. App. Ct. 1989).

Restatement §§ 427 and 427A—something that "necessarily or naturally results in causing an injury." *Tankersley*, 243 P. at 747.[5] Section 427B proposes a much looser standard of vicarious liability pertaining to conduct merely "likely to" cause a trespass. *Tankersley* supplies no basis for adopting that rule.[6]

While Plaintiffs cite no other Oklahoma state law authority to support reading this rule into Oklahoma law, several authorities counsel against doing so. The Oklahoma Supreme Court usually considers the extent to which *other jurisdictions* have adopted a Restatement provision, before doing so itself. *See, e.g.*, *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467, 474-75 (Okla. 1987) (considering the Restatement's "majority position" in state law); *Brigance v. Velvet Dove Rest., Inc.*, 725 P.2d 300 (Okla. 1978) (joining of the Supreme Courts of Alaska, Arizona, Massachusetts, New Jersey, and Pennsylvania); *Munley v. ISC Fin. House*, 584 P.2d 1336, 1339 (Okla. 1978) (discussing the adoption of a Restatement provision by both the New Mexico and Kansas Supreme Courts); *Breeden v. League Servs. Corp.*, 575 P.2d 1374, 1377 (Okla. 1978) (discussing the adoption of a Restatement provision by both the South Carolina and Florida Supreme Courts and finding that it represented the "general state of the law"). Here, as noted, *no*

[5] Section 427 provides that a principal who "employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." Section 427A provides a similar rule, that a principal who "employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity, is subject to liability to the same extent as the contractor for physical harm to others caused by the activity." Restatement (Second) of Torts §§ 427 & 427A.

[6] Plaintiffs rely repeatedly on Judge Eagan's vacated opinion in *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003) (vacated). As they themselves acknowledge, that opinion lacks any precedential value. The Court should consider Oklahoma and Arkansas law in the first instance.

other state has expressly adopted Section 427B despite the fact that it has been part of the Restatement for many decades.

Plaintiffs similarly offer no basis for incorporating Section 427B into Arkansas law. Defendants have found no Arkansas case that discusses or applies Section 427B, and indeed, Plaintiffs reject the proposition that Arkansas law has any application to this case. *See Plaintiffs Response in Opposition to Defendants' Joint Motion for Summary Judgment on Counts 4 & 5,* Dkt. No. 2119 at 7 n.2. As in Oklahoma, it is unlikely that Arkansas has or would adopt Section 427B's loose vicarious liability standard into Arkansas common law. Only just recently, in *Stoltze*, 127 S.W.3d 466, the Arkansas Supreme Court held that Arkansas has explicitly recognized three exceptions to the general rule that an principal is not responsible for the negligence of an independent contractor: (1) where the principal is negligent in hiring the contractor; (2) where the principal negligently fails to perform certain duties the principal has undertaken or performs them in a negligent manner; and (3) where the principal delegates to an independent contractor work that is inherently dangerous. *See id.* at 470. None of these exceptions apply to the facts of the case at bar.

As with Oklahoma, the only relevant recognized exception applies to "inherently dangerous" activities. In applying this exception, the Arkansas Court of Appeals has noted that "when a product is inherently dangerous, the danger of injury stems from the nature of the product itself." *Nelson v. Harding*, 2006 Ark. App. LEXIS 298, 11 (Ark. Ct. App. 2006) (citing *Walker v. Wittenberg, Delony & Davidson Inc.*, 412 S.W.2d 621 (Ark. 1966). The *Walker* court held that inherently dangerous substances are substances such as "dynamite, nitroglycerin, or other explosives" and "poisons." *Walker*, 412 S.W.2d at 531. There is no evidence in the record

to support the notion that the land application of poultry litter in either State is "inherently dangerous" as a matter of Oklahoma or Arkansas law.

2. Even if Section 427B applies to this case, it does not subject Defendants to liability for the conduct of Contract Growers

Even if the Court concludes that Section 427B has some application under Oklahoma and Arkansas law, it has no application in this case. Section 427B applies by its own terms where the actual work contracted for is "*likely* to involve a trespass upon the land of another or the creation of a public or a private nuisance." Restatement (Second) of Torts § 427B (emphasis added). Here, the contracted-for conduct, the raising of poultry, does not necessarily, or even likely, result in a trespass or nuisance.

Plaintiffs' own authorities support this conclusion. Returning to *Tankersley*, the dispute there was similar to the activities at issue in this case in one key respect—the alleged injury-causing activity occurred *after* the contracted work had been completed. In this case, Plaintiffs allege that Growers' use of poultry litter as fertilizer may, under certain circumstances, result in a nuisance or trespass. But the objected-to conduct (*i.e.*, the decision on how, when, and where to use poultry litter) is performed solely by individual farmers and ranchers. *See*, *e.g.*, Dkt. No. 2033 at 5-6 ¶¶14-18, 11-17; *see also* Disputed Facts ¶10. Defendants do not contract with Growers for the purpose of applying fertilizer. Rather, Defendants contract with independent farms solely to raise poultry. *See* Dkt. No. 2033 at 4 ¶9; Disputed Facts ¶10. By the terms of those contracts, the Defendants supply *inter alia* feed, medicine, and technical support, and care for the quality of the conditions in which the birds are raised. *See* Mot. at 9-10 ¶¶10(a)-(c), (f)-(g); Disputed Facts ¶¶10(a)-(c), (f)-(g). However, Plaintiffs have not alleged an injury resulting from any of these activities. Whether a farmer fertilizes his or her fields with poultry litter simply is not an activity which "necessarily or naturally" flows from raising poultry. In fact,

many farmers do not use poultry litter on their lands. *See, e.g.*, Disputed Facts ¶¶10, 28 (citing *inter alia* Butler Dep. at 78:16-24 (Grower Steve Butler sells 100 percent of his litter) (Dkt. No. 2183 Ex. 7); Dkt. No. 2183 Ex. 2 ("A review of the 2008 PFO Registry data from operators located in the IRW … Benton and Washington counties shows that … 65% of all the poultry manure [was] either transferred or sold, although the data does not allow us to assess whether these transfers occur within or outside of the IRW."); *see also* Disputed Facts ¶32 ("[a]t least 70,000 tons of poultry litter is currently exported annually from the IRW.") (internal quotations omitted). Consequently, *Tankersley* weighs against applying Section 427B.

The other authorities Plaintiffs cite underscore this distinction. In *Weinman v. DePalma,* 232 U.S. 571 (1914), unlike the case at bar, the contracted work itself, the construction of a wall, resulted in the alleged nuisance. Similarly in *Shannon v. Missouri Valley Limestone Co.*, 122 N.W.2d 278 (Iowa 1963), the contracted work, the hauling of limestone from a quarry, directly resulted in the nuisance. There, an average of 40 limestone trucks an hour passed in front of plaintiffs' homes, causing dust to rise to a height of 80 feet and reduce visibility to such a degree that the trucks and other traffic usually drove with their lights on. The court found that the dust was irritating to the skin, noise, and throat, seeped into plaintiffs' homes, killed lawns, got in food, forced plaintiffs to keep their homes closed during spring, summer and fall, and generally made ordinary life impossible. The contracted-for activity in *Shannon*, unlike the activity in the case at bar, was inherently tortious. Also in *Bleeda v. Hickman-Williams Co.*, 205 N.W.2d 85 (Mich. App. 1972), the challenged activity, the screening of coke, inherently produced dust and odors.

In this case, Plaintiffs allege that Defendants' contracts with their Growers are likely to result in a nuisance or trespass. For that to be true, Plaintiffs must demonstrate that Contract

Growers routinely shirk their obligations under state law, violate their litter application permits and/or litter management plans, and cause pollution to the waters of the State. Plaintiffs plainly have no evidence that this is the case. *See* Disputed Facts ¶¶29, 39, 48. Indeed, rather than provide such evidence, Plaintiffs attempt to shift the burdens of production and persuasion to Defendants, arguing that Defendants failed to prove the converse. *See* Dkt. No. 2119 at 24. Plaintiffs' theory is that "[t]he land application of poultry waste *in the IRW* is a nuisance at all times and under any circumstances, regardless of location or surroundings." *Id.* at 16 (quotations omitted; emphasis in original).[7] But Plaintiffs have no proof to support this sweeping allegation that *each and every* application of poultry litter is *likely* to cause a trespass or nuisance, even if done in strict accordance with the field-specific litter application instructions drafted, issued and approved by the state.[8] At most, Plaintiffs' proof for summary judgment purposes is that a

[7] *See also, e.g.*, Dkt. No. 1917 at 8 (Mar. 10, 2009); Dkt. No. 2033 Ex. 42 at No. 9 (alleging that "each poultry grower operation … is a source of contamination"); Dkt. No. 2033 Ex. 43 at No. 7 (describing the undifferentiated application of litter as a release of "hazardous substance[s]"); Dkt. No. 2033 Ex. 44 at 2 Nos. 2-3 (describing every application of poultry litter in the IRW as a release or threatened release).

[8] These litter management plans are not merely "guidance document[s]." Mot. at ¶29. Rather, these state-drafted, issued and approved litter management plans are specifically tailored to each parcel of land upon which poultry litter is to be applied, and expressly dictate the time, method, location and amount of poultry litter that may be applied in conformance with the comprehensive poultry litter laws and regulations of Oklahoma and Arkansas. *See* Disputed Facts ¶29. Neither these plans nor state law caution that compliance with these specific instructions may still result in a violation of the law. *See* Dkt. No. 2055 Exs. 10-17. To the contrary, Oklahoma AWMPs each expressly state that "*[t]he law requires* that the Natural Resources Conservation Service (NRCS) recommendations for litter application rates *be followed*." Dkt. No. 2055 Exs. 10-14 at 2 (emphasis added); *see also* Disputed Facts ¶29. Similarly, Arkansas NMPs expressly state that "[t]he contents of this document are *legally binding and must be implemented* through farm practices and procedures." Dkt. No. 2055 Ex. 17 at 8 (emphasis added). Further, both the authors of the plans and the state officials responsible for enforcing the poultry litter laws and regulations have testified that "if a poultry applicator follows the animal waste management plan related to the application site, than that person is complying with Oklahoma law." Disputed Facts ¶29. Notably, State agents have continued to approve and issue new plans for land application of poultry litter within the IRW throughout this litigation. *See, e.g.*, Dkt. No. 2055 Exs. 10-12, 17.

substantial volume of poultry litter is generated during the contracted-for poultry raising services. Beyond that, they have no proof that Growers necessarily or likely violate the law in using or selling it, or that Defendants know that Growers will likely do so. *See* Disputed Facts ¶¶28-29, 39, 47-48. Section 427B simply has no application in this case.

3. Summary judgment is inappropriate in light of disputed facts

Even if this Court were to determine that Section 427B does apply in Oklahoma and Arkansas and could apply to the conduct challenged in this case, Plaintiffs' Motion relies on numerous disputed facts that render summary judgment inappropriate. Section 427B applies when a principal retains an independent contractor to perform work "which the employer knows or has reason to know to be *likely* to involve a trespass upon the land of another or the creation of a public or a private nuisance." Restatement (Second) of Torts § 427B (emphasis added). In order to prevail, Plaintiffs must demonstrate (1) that Defendants have knowledge that a trespass or nuisance is "likely" to result from the contracted-for work; and (2) "harm resulting to [them] from such … nuisance," *i.e.*, an actual injury.

Each of these inquiries is inherently fact-bound. It is telling that none of the authorities Plaintiffs cite (with the exception of Judge Eagan's vacated opinion) supported the granting of a summary judgment pursuant to a vicarious liability standard. Rather, each of Plaintiffs' cases (including *Bleeda*, *McQuilken*, and *Peairs*) expressly held that determination of vicarious liability involved questions of fact for a jury. *See Bleeda*, 205 N.W.2d at 89-90; *McQuilken*, 576 F. Supp. 1023; *Peairs v. Fla. Pub Co.*, 132 So. 2d 561, 567-68 (Dist. Ct. App. Fla. 1961). Likewise, the controlling Oklahoma and Arkansas law recognizes that whether one person is, or can be, liable for the purported tortious acts of another, whether under principles of agency, respondeat superior or some other theory of vicarious liability, is a question of fact that usually may not be determined under a motion for summary judgment. *See A-Plus Janitorial & Carpet*

Cleaning v. Employers' Workers' Compensation, 936 P.2d 916 (Okla. 1997); *Bell v. Tollefsen*, 936 P.2d 932, 938-39 (Okla. 1989); *Frazier v. Bryan Mem'l Hosp. Auth.*, 775 P.2d 281, 288 (Okla. 1989); *Gish v. ECI Servs. of Okla., Inc.*, 162 P.3d 223, 234 (Okla. Civ. App. 2006); *ConAgra Foods, Inc. v. Draper*, 276 S.W.3d 244, 249-52 (Ark. 2008); *McMickle v. Griffin*, 254 S.W.3d 729, 741-42 (Ark. 2007); *Pointer v. Ricker*, 476 S.W.2d 798, 799 (Ark. 1972) (citing *Johnson v. Newman*, 271 S.W. 705 (Ark. 1925)).

A party's knowledge or notice is generally a question of fact. *See Spencer v. City of Bristow*, 165 P.3d 361, 366 (Okla. Civ. App. 2007). "'The existence of facts or circumstances sufficient to put one on inquiry ... presents a question of fact inappropriate for summary disposition.'" *Id*. (quoting *Manokoune v. State Farm Mut. Auto. Ins. Co.*, 145 P.3d 1081, 1085–86 (Okla. 2006); *see Terry v. Edgin*, 561 P.2d 60, 66–67 (Okla. 1977) (noting that notice, *i.e.*, knowledge, "has always been a question of fact"); *Seidenstricker Farms v. Doss*, 270 S.W.3d 842, 848 (Ark. 2008) ("[W]hat constitutes reasonable notice is a question of fact…."); *Cotner v. Int'l Harvester Co.*, 545 S.W.2d 627, 630 (Ark. 1977) (same). Likewise, the determination as to whether an actionable nuisance exists is nearly always a question of fact for the jury. *See Smicklas v. Spitz*, 846 P.2d 362, 367 (Okla. 1997); *N.C. Corff P'ship, Ltd. v. OXY USA, Inc.*, 929 P.2d 288, 294 (Okla. Civ. App. 1996); *Milligan v. General Oil Co.*, 738 S.W.2d 404, 406 (Ark. 1987); *McLean v. Ft. Smith*, 48 S.W.2d 228, 229-30 (Ark. 1932).

Finally, the "likely" element of the Section 427B standard is a question of fact for the jury to decide. The word "likely" is synonymous with the word "probable." *Willard Oil Co. v. Riley*, 115 P. 1103, 1105 (Okla. 1911); *see Wackenhut Corp. v. Jones*, 40 S.W.3d 333, 336 (Ark. Ct. App. 2003). Oklahoma and Arkansas courts have long used the two terms interchangeably. *See, e.g., Stillwater Milling Co. v. Eddie*, 108 P.2d 126, 128-29 (Okla. 1940); *Mo. Pac. R.R. Co.*

v. Ward, 115 S.W.2d 835, 838 (Ark. 1938). "Probable" is defined as "'[h]aving more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." *Willard Oil*, 115 P. at 1105; *see Spadra Creek Coal Co. v. Harger*, 197 S.W. 705, 705 (Ark. 1917) (same). In other words, whether an outcome is "likely" requires weighing of facts and evidence. *See, e.g.*, *Mollett v. Mullins*, 348 F.3d 902, 908 (10th Cir. 2003) (whether a defendant is "likely" to be a continuing threat to society is a "factual question"); *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 972 (10th Cir. 2002) (whether there is a "likelihood of confusion" is a "factual determination," over which the court may only monitor the "outer limits"). Thus, the elements that Plaintiffs have to prove under Section 427B are questions of fact which preclude summary relief. *Cf. Sally Beauty Co.*, 304 F.3d at 972 ("If the nonmovant demonstrates a genuine issue of material fact regarding the *likelihood* of confusion … summary judgment is not appropriate." (emphasis added)).

Plaintiffs rely on disputed facts throughout their Motion. Their allegations of purported knowledge at most speak to a general risk that may arise from the systematic *misuse* of poultry litter. *See* Mot. at 15-16 ¶28, 23-24 ¶47; *but see* Disputed Facts ¶¶28, 47. That hardly satisfies the requirement of knowledge that a nuisance *will occur* from any particular farmer's work or knowledge that a nuisance *will likely occur* from the subject matter of the contract. To the contrary, the record evidence is that Defendants do not know or have reason to know that a nuisance or trespass is likely to result from their contracts with Growers in the IRW, as Growers apply litter consistent with state permits and state laws. *See, e.g.*, Disputed Facts ¶¶28-29, 39, 47-48. In the face of these facts, the Court simply cannot decide as a matter of law that Cobb-Vantress knew or should have known that a nuisance or trespass is likely to result from the work of the farmers it contracts with to raise poultry on their farms in the IRW.

Plaintiffs are thus left to argue that awareness that poultry litter will be used as a fertilizer in accordance with the comprehensive poultry litter laws and regulations of Oklahoma and Arkansas is sufficient to support knowledge that an actionable nuisance or trespass is likely to result. This assertion is inconsistent with Oklahoma's own view of poultry litter as an effective fertilizer, and encouragement of its use. *See* Disputed Facts ¶36; Dkt. No. 2033 at 2-3 ¶¶3-4 (citing sources). Arkansas also recognizes poultry litter as an effective fertilizer, and encourages and approves its use. *See* Disputed Facts ¶36; Dkt. No. 2033 at 2-3 ¶¶3, 5 (citing sources). If the mere use of poultry litter as a fertilizer creates in all circumstances a nuisance or trespass, then Oklahoma is complicit in bringing about Plaintiffs' claimed injuries because they have authorized and continue to authorize the use of poultry litter as a fertilizer in the IRW. *See* Disputed Facts ¶29.

Moreover, Defendants and various entities of the State of Oklahoma and the State of Arkansas have taken steps to ensure that a nuisance will not occur from any farmer's poultry operations. Defendants' contracts with Growers contain provisions which require the farmers to follow all applicable laws related to poultry litter. *See* Dkt. No. 2033 at 6-7 ¶22. Oklahoma and Arkansas authorize and comprehensively regulate the land application of poultry litter within their respective state boundaries. *See* Disputed Facts ¶29; Dkt. No. 2033 at 2-3 ¶¶4-7; *see also* 2 Okla. Stat. § 10-9.1, *et seq.*; *id.* § 10-9.7, *et seq.*; *id.* § 10-9.16, *et seq.*; *id.* § 20-40, *et seq.*; Okla. Admin. Code § 35:17-5-1, *et seq.*; Ark. Code Ann. § 15-20-901, *et seq.*; *id.* § 15-20-1101, *et seq.*; ANRC Reg. 1901.1, *et seq.*; *id.* tit. 21, 2001.1, *et seq.*; *id.* § 2101.1, *et seq.*; *id.* tit. 22, § 2201.1, *et seq*. Pursuant to these laws and regulations, every application of poultry litter to land in the IRW must be performed by a registered poultry farmer (Grower) or certified applicator consistent with a nutrient management plan (NMP) *and/or* animal waste management plan

(AWMP) approved by agent(s) for the states of Oklahoma or Arkansas. *See* Dkt. No. 2033 at 3 ¶7. These state-drafted, issued and approved poultry litter management plans are specifically tailored to the each parcel of land and dictate the time, method, location and amount of poultry litter that may be applied.[9] *See* Disputed Facts ¶29; Dkt. No. 2033 at 3 ¶7 (citing sources); *see also* 2 Okla. Stat. §§ 10-9.7, 10-9.16, *et seq.*, *id.* § 20-48; Okla. Admin. Code § 35:17-5-1, *et seq.*; Ark. Code Ann. § 15-20-1108(b)(1); *id.* § 15-20-1101, *et seq.*; ANRC Reg. 2201.1, *et seq.*; *see, e.g.*, Dkt. No. 2033 Exs. 10-17. To accept Plaintiffs' argument under Section 427B, the Court would have to find as a matter of law that these safeguards developed by the legislatures and regulatory agencies of the two states are insufficient to prevent a trespass or creation of a nuisance *and* that Cobb-Vantress knew or should have known of that deficiency in the standards.

Poultry litter is applied in the IRW consistent with Oklahoma and Arkansas laws. *See* Disputed Facts ¶¶39, 41; Dkt. No. 2033 at 4 ¶8. On this point, Plaintiffs have made no effort to disaggregate appropriate from inappropriate litter applications, nor identified evidence of any poultry litter applications made contrary to the specific instructions provided by Arkansas or Oklahoma under their comprehensive poultry litter laws and regulations. *See* Disputed Facts ¶39. Consequently, to accept Plaintiffs' argument under Restatement Section 427B, the Court would have to find as a matter of law that when growers or third parties apply poultry litter consistent with the specific instructions provided by the two states, Defendants know or should know that a nuisance or trespass is likely to result.

Where a legislature has authorized an activity, such as the use of poultry litter through the state-approved NMPs or Animal Waste Management Plans, the activity cannot amount to a nuisance or trespass. *See* 50 Okla. Stat. § 4; *Sharp v. 251st St. Landfill, Inc.*, 810 P.2d 1270,

[9] As detailed *supra*, these state-drafted, issued and approved litter management plans are not merely "guidance documents." *See supra* at 9 n.8; Disputed Facts ¶29.

1274 n.4 (Okla. 1991); *E.I. du Ponte Nemours Powder Co. v. Dodson*, 150 P. 1085, 1087 (Okla. 1915); *see also* Dkt. No. 2033 at 17-20; Dkt. No. 2055 at 13-19. Thus, the only knowledge that can be inferred to Defendants under these facts is that, in raising poultry in compliance with their contracts, Contract Growers' use of poultry litter complies with applicable law and is not an actual or potential threat to the environment or an actionable nuisance. Accordingly, Plaintiffs have not established the first element required under Section 427B.

Likewise, Plaintiffs have not established the second element of their Section 427B claim, that the independent Growers under contract with Cobb-Vantress have created a nuisance and that Plaintiffs have suffered an actual injury. Plaintiffs' "proof" of this element rests on bald assertions in their Motion that the waters of the IRW have been injured by elevated levels of phosphorus, and that land applied poultry litter is a source of these elevated levels. *See* Mot. at 56. However, these flawed assertions are subject to a legion of disputed issues of material fact. *See* Disputed Facts ¶¶42-52. Plaintiffs have requested the Court ignore those issues of fact and presume a nuisance and an actual injury, which the Court cannot permissibly do.

In sum, Plaintiffs' Motion is based entirely on generalized claims that use of poultry litter is "likely" to cause harm. Plaintiffs request the Court to construe their evidence of Defendants' purported generalized "knowledge" as the knowledge required under Section 427B, to ignore contrary evidence on Defendants' knowledge, and to resolve the inherently factual question of whether or not a trespass or injury is "likely." As such, Plaintiffs' Motion for Partial Summary Judgment on the issue of liability for Growers' disposal of poultry litter must be denied.

B. Plaintiffs Are Not Entitled to Summary Judgment as to Injunctive Relief Under Their Federal or State Claims

Plaintiffs ask the Court to award them injunctive relief on summary judgment under their federal and state common law nuisance claims, representing to the Court that it is undisputed that

phosphorous from poultry litter poses a "significant threat of injury" (Federal) or "a reasonable degree of probability" of injury (State) in the IRW. *See* Mot. at 58-58, 61-64. This request should be denied for the reasons set forth in *Defendants' Motion for Summary Judgment as to Counts 4 and 5*, Dkt. No. 2033 (May 11, 2009). Moreover, Plaintiffs' Motion essentially and improperly asks the Court to assume the key factual dispute in this case. These claims are legally deficient and not supported by the undisputed record.

First, Plaintiffs' statement of the legal standards is incorrect. As explained in *Defendants' Joint Motion for Partial Summary Judgment on Plaintiffs' Damages Claims Preempted or Displaced by CERCLA*, Dkt. No. 2031 at 21-11 (May 11, 2009), federal common law is very much the exception, not the rule. *See Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Federal common law persists in only a "few and restricted" areas. *Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); *see also Norfolk S. Ry. Co. v. Energy Dev. Corp.*, 312 F. Supp. 2d 833, 837 (S.D. W. Va. 2004) (same). Despite this substantial narrowing of federal common law over the past century, Plaintiffs ask the Court to equate liability under federal common law with the permissive standard for relief under RCRA. Plaintiffs cite no caselaw or other authority for that proposition apart from their own *ipse dixit*. *See* Mot. at 59.

Likewise for state law nuisance, Plaintiffs allege that an injunction may issue upon a showing of a "reasonable degree of probability" of harm, which they similarly equate, without authority, to the RCRA substantial endangerment standard. *See* Mot. at 61. Plaintiffs thus seek summary judgment under these theories on a standard of their own invention.[10]

[10] Defendants do not invoke Oklahoma's "right to farm" law as Plaintiffs fear. *See* Opp. at 62. It is important to note, however, that in this context Plaintiffs insist on site specific proofs "*for each land application site.*" Opp. at 63. Plaintiffs thereby concede that, to prevail on these claims,

Second, Plaintiffs are not entitled to injunctive relief because the requested injunction would be futile. Federal courts should "refrain[] from issuing an injunction unless the injunction 'will be effective to prevent the damage which it seeks to prevent.'" *Humble Oil & Refining Co. v. Harang*, 262 F. Supp. 39, 43-44 (D. La. 1966) (quoting *Great N. Ry Co. v. Local Union No. 2409*, 140 F. Supp. 393, 394-96 (D. Mont. 1955) (declining to enjoin union picketing where injunction would not prevent railroad's own employees from separately refusing to handle cars associated with the picketed facility).

As the Court is well aware, poultry litter in the IRW is not land applied by Defendants but by farmers and ranchers, none of whom are parties before the Court. It is blackletter law that a federal court cannot issue an injunction to restrain or command parties not before it. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315–16 (1979); *People by Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 70 (2d Cir. 1996); *see also* Charles Alan Wright et al., Federal Practice and Procedure § 2956 (2009 Supp.) ("A court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction."). It is equally well established that a court should "not grant an injunction to restrain one from doing what he is not attempting and does not intend to do." *Blease v. Safety Transit Co.*, 50 F.2d 852, 856 (4th Cir. 1931); *see Aerated Prods. Co. v. Dep't of Health*, 159 F.2d 851, 854 (3d Cir. 1947) (same).

To avoid these rules, Plaintiffs instead ask the Court to restrain these non-parties indirectly by affirmatively enjoining Defendants. But such an order would be ineffectual. Defendants' contractual relationships with their Growers regard the raising of poultry, not the application or sale of poultry litter. *See* Dkt. No. 2033 at 4 ¶9; Disputed Facts ¶10. Quite the

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Plaintiffs need to demonstrate site-specific causation linking particular farms to alleged harms. Plaintiffs have made no attempt to provide such site-specific evidence. *See* Disputed Facts ¶48.

contrary, the poultry litter in question is the Growers' property, and Defendants have no authority to dictate its disposition. *See* Dkt. No. 2033 at 5-6 ¶¶14-18; Disputed Facts ¶10. Plaintiffs' contention rests on their assertion that Defendants commanded their Growers to comply with the *City of Tulsa* settlement. *See* Mot. at 13 ¶17. But the only testimony on that point is that the Growers in the Eucha-Spavinaw Watershed agreed voluntarily to comply with the consent order entered in that case. *See* Disputed Facts ¶17 (citing P.I.T. at 1355:8-1356:4 (Dkt. No. 2183 Ex. 1)). This case, covering a million acre watershed, sweeps much more broadly and would impact many more Growers. There is no evidence that Growers will similarly voluntarily abide by an injunction. *See id*. While Defendants could attempt to negotiate with their Growers to curtail some use of poultry litter, there is no guarantee that this would be effective. Indeed, the unrebutted testimony is that many farmers and ranchers add poultry raising to their business operations specifically to gain access to poultry litter as a fertilizer or additional source of income. *See* Dkt. No. 2050 at 3-4 ¶¶13, 16; Disputed Facts ¶¶25, 47. Moreover, Plaintiffs' back-door injunction would not apply at all to the some 50 percent of farmers and ranchers in the IRW who have no contractual relationship with any Defendant but instead use poultry litter obtained from the general marketplace. *See* Dkt. No. 2033 at 6 ¶19; *see also* Disputed Facts ¶¶10, 28 (citing Dkt. No. 2183 Ex. 2 at 57-58 ("A review of the 2008 PFO Registry data from operators located in the IRW … Benton and Washington counties shows that … 65% of all the poultry manure [was] either transferred or sold, although the data does not allow us to assess whether these transfers occur within or outside of the IRW.")).

Third, whatever the applicable legal standard, Plaintiffs' claims for injunctive relief under federal and state law nuisance law fail for the same reason their RCRA claim fails: the allegedly

undisputed facts upon which their motion relies are, in truth, roundly disputed. *See Def. Tyson Poultry, Inc. Opp. to Pls.' Mot. for Partial Summary Judgment With Regard to Plaintiffs' Claims Under CERCLA and RCRA*, Dkt. No. 2184 at 14-16 (June 5, 2009); Disputed Facts ¶¶46-48, 54. Defendants have no control over or involvement with contract Growers' application or sale of poultry litter, and therefore can hardly be held responsible under either of these theories for creating a nuisance. *See* Disputed Facts ¶10; *see also* Dkt. No. 2033 at 5-6 ¶¶14-18. Moreover, Defendants dispute Plaintiffs' assertions that phosphorous from poultry litter causes, or is likely to cause, injury in the IRW. *See* Dkt. No. 2184 at 14-16; Disputed Facts ¶¶46-48, 54.

Plaintiffs' claims for injunctive relief are no different from their other state law claims and (if not dismissed pursuant to Defendants' summary judgment motions) must wait for trial.

C. Plaintiffs Are Not Entitled to Summary Judgment as to Their Claim for Injunctive Relief Under 27A Okla. Stat. § 2-6-105

Finally, Plaintiffs seek an order of partial summary judgment with respect to their claim for injunctive relief under Count 7 premised on their belief that every land application of poultry litter in the IRW constitutes the "place[ment] [of] wastes in a location where they are likely to cause pollution of any air, land or waters of the state." *See* Mot. at 60-61; 27A Okla. Stat. § 2-6-105.[11] Plaintiffs' request is deficient for the same reasons described *supra*, as an injunction will be futile and the allegedly undisputed facts upon which their motion relies are, in truth, disputed. Plaintiffs' request for summary judgment on Count 7 should moreover be denied on the bases set forth in *Defendants' Joint Motion for Summary Judgment on Counts 7 & 8*, Dkt. No. 2057 (May 18, 2009) ("Defendants' State Statutory Motion").

First, as a matter of statutory construction, application of poultry litter in the IRW cannot

[11] Plaintiffs do not identify evidence of any specific applications that are alleged to have been made in violation of 27A Okla. Stat. § 2-6-105. *See* Mot. at 34 ¶54, 60-61; *see also* Dkt. No. 2057 at 16-17 n.9.

constitute a violation of 27A Okla. Stat. § 2-6-105 where performed in compliance with the specific instructions set forth in Oklahoma's comprehensive poultry litter management laws and regulations. *See* Dkt. No. 2057 at 17-22. Oklahoma expressly authorizes the use of poultry litter as a fertilizer in the IRW pursuant to a regulatory scheme that controls every aspect of the activity, dictating who may apply litter, what training and licensing they must receive, when and where they may do so, under what conditions and in what amounts for each individual parcel of land. *See id.* at 17-18 (citing Undisputed Facts ¶¶18-19); *see also* Disputed Facts ¶¶29, 39. Absent evidence of specific violations of these regulations, it is impossible as a matter of statutory construction for the alleged conduct to constitute a violation of 27A Okla. Stat. § 2-6-105. *See* Dkt. No. 2057 at 17-22. Indeed, any interpretation to the contrary would render the statutory provision unconstitutional under the void for vagueness doctrine of the Fourteenth Amendment. *See id.* at 21-22. For these reasons, which are fully set forth in Defendants' State Statutory Motion, Plaintiffs' request for partial summary judgment should be denied.

Second, Plaintiffs have failed to satisfy their burden to identify specific record evidence establishing each alleged violation of the state statutory provision, including proof of the specific Oklahoma-based conduct for which each Defendant may be held liable. *See* Dkt. No. 2057 at 24-25. As noted by Plaintiffs' own motion, "[t]his Court has previously ruled that 27A Okla. Stat. § 2-6-105 cannot be applied extraterritorially." Mot. at 60 n.19 (citing June 15, 2007 Tr. at 44; Dkt. No. 1202); *see also* Dkt. No. 2057 at 11. Yet, Plaintiffs' purported evidence in no way differentiates between Oklahoma- and Arkansas-based conduct, nor identifies the specific "place[ment] of wastes" for which each Defendant may be held liable.[12] *See* Mot. at 5-34, 60-

[12] Plaintiffs' failure in this respect is particularly significant given the undisputed fact that (1) the vast majority of the poultry growing operations at issue are located in Arkansas—not Oklahoma, *see* Mot. at 33 (citing Pls. Ex. 71); and (2) many of the Defendants do not currently contract

61; *see also* Dkt. No. 2057 at 24-25. Because Plaintiffs have not satisfied their burden of proof, Plaintiffs' request for summary judgment must be denied.

CONCLUSION

For the foregoing reasons, Defendant Cobb-Vantress respectfully request the Court to deny Plaintiffs' Motion for Partial Summary Judgment as to Plaintiffs' state law and federal common law claims in its entirety.

Respectfully submitted,

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and/or never have contracted with Growers operating in the State of Oklahoma, *see id.*; Disputed Facts ¶¶9(a)-(l). *See also* 27A Okla. Stat. § 2-3-504 (penalizing each *individual* violation of 27A Okla. Stat. § 2-6-105).

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